Filed 6/5/19 In re Jones CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re CLAY JONES on Habeas Corpus.	C087866 (Super. Ct. No. 17HC00267)

This appeal follows the superior court's granting of a petition for writ of habeas corpus, and its finding petitioner Clay Jones was detained in violation of his right to a speedy trial under the United States Constitution pending trial on the issue of whether he was a sexually violent predator. It found two of petitioner's defense attorneys, the prosecution, and the court contributed to the delay by either not demonstrating or not insisting upon a good cause showing for the numerous continuances that occurred over the course of 14 years. Instead, the handing out of pro forma continuances in petitioner's absences resulted in a denial of due process when there was no demonstration that any progress was ever made in preparing the defense for trial. The People appeal.

While we disagree that petitioner suffered a 14-year delay and instead conclude he suffered a 10-year delay, we nonetheless affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 29, 2017, petitioner filed a petition for writ of habeas corpus alleging his federal due process right was violated because the state failed to bring his involuntary commitment case under the Sexually Violent Predator Act (the Act) to trial within a reasonable time. (Welf. & Inst. Code,[1] § 6600 et seq.) Petitioner alleged he had been unlawfully detained by the California Department of State Hospitals (the Department) at Coalinga State Hospital (Coalinga) since August 2, 2004, based on a petition filed on April 20, 2004. He alleged his unlawful detainment was as much the product of the ineffectiveness of his two appointed attorneys as the prosecution's and court's failure to bring him to trial. As relief, petitioner requested the petition filed under the Act be dismissed.

The following facts were developed from the court's review of the minute orders in petitioner's underlying sexually violent predator case, the parties' moving papers and attached exhibits, and an evidentiary hearing on the present writ petition.

I

Robert Saria's Representation Of Petitioner

Robert Saria was appointed to represent petitioner in June 2004. Then, on September 9, 2004, a " 'paper' review" pursuant to section 6601.5 was undertaken where the court found probable cause to believe petitioner was likely to engage in sexually violent predatory criminal behavior upon his release from prison and ordered him detained pending a formal probable cause hearing.

---

[1] Further section references are to the Welfare and Institutions Code unless otherwise indicated.

The formal probable cause hearing was held approximately two years later on July 24, 2006.[2] Between the paper probable cause hearing and the formal probable cause hearing, the court granted multiple continuances. Because more than 10 years elapsed since some of the hearings in which continuances were granted, some, but not all, of those transcripts have been destroyed. The minute orders of these hearings do not reflect the reasons for the continuances and neither do the reporter's transcripts. Some of the continuances appear to be at the request of petitioner's counsel while others appear to be at the request of the prosecution or stipulations between the parties.

Petitioner was present for the hearing following the paper probable cause hearing but was not present for any hearing attended by counsel until May 18, 2006, when he made a *Marsden*[3] motion to replace Saria. The reporter's transcript of the May 18 hearing does not appear in the record, but part of the motion petitioner filed does. In the motion, petitioner alleged Saria provided inadequate and unproductive representation for the past 18 and one-half months. In particular, petitioner alleged Saria failed to communicate with him, to confer with and advise him about the preparation of his defense, or to provide a meaningful and effective investigation that included witnesses favorable to the defense and an unbiased expert witness. As a result, petitioner alleged his case had been subject to continued delay, which prejudiced him. Petitioner requested

---

[2] The only witness called at the formal probable cause hearing was one of the experts who prepared an evaluation on whether petitioner met the criteria of a sexually violent predator. That evaluation was admitted into evidence, as was an evaluation from another expert. The court also admitted records from the Department of Corrections and Rehabilitation pertaining to petitioner's qualifying offenses and Yolo County Superior Court records pertaining to petitioner's 1982 conviction for using a minor to assist in the distribution of obscene material.

[3] *People v. Marsden* (1970) 2 Cal.3d 118.

that he be granted pro. per. status and given a 90-day continuance to prepare for the probable cause hearing.

Attached to the motion were multiple letters written by petitioner to Saria spanning from October 29, 2004, to May 3, 2006. In the letters, petitioner complained to Saria about Saria's lack of communication. In the October letter, petitioner additionally asked about the outcome of a writ proceeding Saria had filed in this court on petitioner's behalf following the paper probable cause finding.[4] He requested Saria ask for a long continuance for the probable cause hearing to await the result, because he had heard it took the appellate courts a long time to decide cases. In a February 8, 2005, letter, petitioner indicated he had spoken with Saria's investigator about presenting a defense at the probable cause hearing, specifically to call the mother of petitioner's victims to attack the underlying charges. Petitioner requested Saria get a continuance at the next hearing (February 25, 2005) so that they could pursue that defense. Petitioner further asked for a status update about the writ petition filed in this court and whether Saria had sought review of any denial in our Supreme Court.

On February 19, 2005, petitioner wrote to Saria again. He requested Saria return letters he gave to Saria's investigator purporting to be from the mother of petitioner's victims, wherein she indicated she was pressured into testifying for the prosecution. In early March, petitioner wrote to Saria stating he sustained an injury to his left ear and wished for his interview with the defense expert be delayed. A few weeks later, he wrote to Saria complaining about the psychologist sent to interview him for his defense and wanted to speak with Saria before being seen by any defense expert.

---

[4] The record reflects Saria filed a petition for writ of habeas corpus in the trial court and that is was denied on the same day the paper probable cause hearing was held. At the evidentiary hearing on the present petition, Saria testified he appealed that denial to our court and that it was denied the same day on which he filed it. Saria did not take any further action regarding the writ petition.

In a letter dated June 26, 2005, petitioner acknowledged he spoke with Saria's investigator who told him to send everything to Saria that would help petitioner's case. Petitioner requested Saria get a continuance so that his mother would have time to locate the necessary documents. In petitioner's next letter, he complained to Saria about being transported to and appearing in Sacramento County Superior Court for a hearing on July 19, 2005; a hearing where Saria failed to appear.[5] Petitioner further complained that many of his files and paperwork, including letters from the mother of his victims, was missing from the property delivered to him from his prior prison commitment. Petitioner requested Saria get a continuance so that Saria could obtain a court order forcing the prison to deliver the letters to him given that the letters were vital to his defense.

In February 2006, petitioner again wrote to Saria asking for a status update concerning his probable cause hearing. A month later, petitioner informed Saria he was not comfortable going forward with the probable cause hearing on April 21, 2006, given Saria's lack of communication and wanted a 30-day continuance. He did indicate, however, that he wanted his probable cause hearing to occur by August 21, 2006, whether Saria was prepared or not. A week later, petitioner corrected his statement and told Saria he meant to say he wanted his probable cause hearing to occur by May 21, 2006, regardless of Saria's level of preparation. He also indicated his family was saving money and searching for another attorney to represent him.

In mid-April 2006, petitioner wrote to Saria again indicating he wanted an extension of time to retain private counsel and was concerned that the prosecutor wanted to evaluate him given the extensive passage of time since the original evaluations. Petitioner reiterated he wanted to speak with Saria before speaking with the defense expert and also that he wanted the probable cause hearing to occur regardless of who was

---

[5] While the clerk's transcript reflects this hearing took place, it does not indicate who was present. There is no reporter's transcript of this hearing.

representing him at the conclusion of the next continuance. In early May 2006, petitioner wrote to Saria about being transported to the Sacramento County Jail without seeing Saria or appearing in court. Although he knew Saria was starting another trial and was busy, petitioner wished Saria would write to him so that he knew what was going on with his case. Because petitioner had not heard from Saria, he felt he had no choice but to ask for another continuance when Saria appeared at the next hearing.

As indicated, on May 18, 2006, petitioner appeared in court where he brought a *Marsden* motion to relieve counsel. The court heard the motion but continued the matter to May 24, 2006, when the motion was denied. The probable cause hearing was continued to July 21, 2006, and then continued again to July 24, 2006. On that date, petitioner brought another *Marsden* motion. While the transcript of the probable cause hearing appears in the record, the *Marsden* hearing does not. The court found probable cause and ordered petitioner detained pending trial.

Following the formal probable cause hearing, no reporter's transcript appears in the record until May 4, 2007; however, the clerk's transcript makes clear that hearings were held before that date. It is clear petitioner was not present for at least three of these hearings. It is unclear whether he appeared for the other four hearings. At the January 4, 2007, hearing, petitioner brought a *Marsden* motion; however, the record does not reflect whether the court heard or ruled on the motion and there is no reporter's transcript of the *Marsden* hearing. The clerk's transcript indicates that multiple hearings starting in January 2007 were continued because petitioner was seeking private counsel. This is confirmed by the reporter's transcript of the May 4, 2007, hearing, in which the prosecution asked for a continuance so that it could confirm whether petitioner was ever successful at obtaining private counsel. Neither Saria nor petitioner was present at this hearing, and while it appears Saria represented petitioner at this time, petitioner filed a malpractice complaint against Saria and his law partner Ken Rosenfeld the month before creating a conflict between petitioner and Saria.

Petitioner's declaration attached to the malpractice complaint alleged that Saria had failed to communicate with him or conduct a meaningful investigation since his appointment in July 2004. Saria had also failed to protect legal documents and information petitioner provided to him. Further, Saria refused to prepare for the probable cause hearing and petitioner was not brought to a probable cause hearing until June 2006.[6] Saria promised and then failed to provide petitioner with the law and defense strategies, copies of prosecution evidence (except for the experts' reports) and defense discovery, and failed to communicate with him. At the time the complaint was filed, communications from Saria were vague and ambiguous, and petitioner believed Saria lost key defense evidence and conducted an incomplete investigation by failing to contact pertinent defense witnesses and failing to provide two expert psychologists. Over the prior year and one-half, Saria was unproductive, and the relationship broke down. Although petitioner requested it, Saria refused to disqualify himself and petitioner's attempts to represent himself were unsuccessful.

In September 2006, petitioner told Saria he and his family would hire a private attorney. Then, in December 2006 petitioner wrote to the prosecution and court, while serving Saria with these letters, informing them of the same. Petitioner heard no response until after his mother informed Saria of petitioner's concerns and Saria sent him a letter attempting to fix the relationship. In January 2007, Saria visited petitioner in the Sacramento County Jail where petitioner was being held due to Saria's failure to cancel a transfer request. Saria failed to bring the legal documents petitioner requested but promised to mail them to petitioner. Upon petitioner's transfer back to Coalinga, Saria did not follow through with his promises. In February 2007, petitioner informed Saria he

---

[6] This appears to be a typo, as petitioner was not tried at a formal probable cause hearing until July 2006.

still wished to obtain different counsel and that the present trial date would not work for his counsel to prepare himself. Petitioner requested a continuance of six months or more.

At the evidentiary hearing on petitioner's current writ petition, Saria testified that he had extensive knowledge regarding proceedings under the Act having handled them since 1999 or 2000 while working for the Sacramento County District Attorney's Office and as a member of the defense panel since 2003. Over the course of those years the law had evolved requiring stays of pending litigation; however, he did not know whether petitioner's case was ever stayed and would have assumed something like that would be noted in the record.[7] Saria had no independent knowledge of petitioner's case, except for the initial writ petition heard in conjunction with the paper probable cause hearing. Neither did Saria have any independent knowledge of communications with petitioner about petitioner's probable cause hearing, defense strategies, or Saria's level of preparedness. To his knowledge, petitioner did not engage in any sort of tactical delay.

In Saria's opinion, it was nearly impossible to be unprepared for a probable cause hearing because all that was required was to review the evaluations provided by the prosecution. At those hearings, the prosecution usually submits the written evaluations and the respondent (in this case, petitioner) would have the ability to cross-examine the experts provided he or she arranged for the experts' presence at the hearing. Saria believed petitioner's probable cause hearing was near the time the Act had taken effect and it was difficult to secure the presence of experts because of the large number of cases working through the system. If petitioner had told him he wanted a probable cause hearing, then Saria would have set it for a probable cause hearing immediately.

While Saria did not recall petitioner giving him letters from the mother of petitioner's victims, he did not know what the appropriate action would be in response to

---

[7] There is no indication in the record that petitioner's case was ever stayed.

those letters. In his opinion, the victim recanting would not be relevant to a pending petition under the Act because the general standard is that predicate offenses are not allowed to be relitigated.

II

Alan Whisenand's Representation Of Petitioner

Following the hearings in May 2007, petitioner's next hearing was on October 10, 2007, where he was represented by Alan Whisenand, a state appointed attorney. Whisenand remained petitioner's counsel for nearly seven years. Over the course of those years, petitioner was not present at any hearing, except for one in November 2013. The hearings were held on average every two to five months with limited exceptions.

The clerk's transcripts of these hearings show no reasons for the requested continuances. The first hearing in which Whisenand represented petitioner (October 10, 2007), he and the prosecution agreed to continue the matter to February 19, 2008. In February, Whisenand could not appear at the hearing because he was in trial and the matter was continued to May. In May, Whisenand asked for a continuance on behalf of petitioner who was not transported to court upon his own request and entered a time waiver through Whisenand. The prosecution represented that it understood Whisenand had two murder trials approaching and the closest available trial date for the parties was in September, which was agreeable to the court and the matter was continued. In September, Whisenand stated he was finishing a trial and was about to start a two-month trial. He asked to continue petitioner's trial until February 2009. The prosecutor did not object and the court granted Whisenand's request.

Although three hearings were held in February 2009, Whisenand could attend only the last one on February 20. At the February 6 hearing, however, the prosecution requested the trial date be continued to February 20, so the prosecution could obtain updated evaluations of petitioner in light of new state protocols. On February 20, Whisenand requested the trial date be set for May 27, 2009, with a trial readiness

conference set for May 18. No reason was given for the continuance, but the prosecution agreed, as did the court. A transcript of the May 18 hearing does not appear in the record, but the minute order indicated the trial was continued to September 2, 2009.

On September 2, 2009, Whisenand, on behalf of himself and petitioner, requested petitioner's trial date be continued to February 23, 2010, because of Whisenand's extensive trial calendar for the rest of the year. He waived petitioner's speedy trial right. The prosecution agreed because it understood petitioner entered the sexually violent predator program to try to better his chances at trial.[8] The reporter's transcript of the next hearing on February 16, 2010, indicates that neither the prosecutor assigned to the case nor Whisenand was present; however, the minute order indicates the trial date was vacated and the matter put over to June 8, 2010.

On June 8, 2010, Whisenand requested a continuance to September 8 because he was awaiting test results and was involved in trials until that date. The prosecution agreed because it believed Whisenand had good cause to continue the matter, but noted petitioner had a right to trial within a reasonable time. On September 8, Whisenand was not present because he was in trial and the matter was continued to September 17, 2010. On September 17, Whisenand asked for another continuance to November 19, 2010, stating petitioner was "not desirous of setting a trial" at that time. On November 19, 2010, Whisenand asked for a trial setting hearing on January 21, 2011, because he needed to review reports and expert opinions. Then, on January 21, 2011, Whisenand requested the matter be continued to March 25, 2011, because petitioner was "undergoing programming." He further indicated he had received a recent evaluation and expected more, and thus did not believe a trial would be set at the next hearing.

---

[8] While housed at Coalinga, petitioner never participated in the sexually violent predator program, although he was offered treatment.

The reporter's transcript of the March 25, 2011, hearing does not appear in the record, however, the minute order of that hearing indicates Whisenand requested the matter be continued to August 31, 2011, for a status conference. Whisenand did not appear for the August 31 hearing because he was in trial and the matter was put over to September 9, 2011. On September 9, 2011, Whisenand requested trial be set for April 17, 2012, because of calendaring issues and because he still needed some evaluations to be done. The prosecution agreed but noted the evaluations were defense evaluations. At the trial readiness conference held on March 29, 2012, Whisenand requested petitioner's trial date be vacated because petitioner was being forcibly medicated and Whisenand needed to investigate to determine whether petitioner was competent to stand trial. The prosecution agreed to the continuance and noted Whisenand had just started voir dire in another case. It represented to the court, however, that it was ready to go to trial. The court continued the matter to April 20, 2012, for a status conference.

Whisenand was not present for the April 20, 2012, hearing because he was in trial, and the matter was put over to April 27, 2012. Multiple continuances occurred thereafter without reasons stated on the record. Then, on February 26, 2013, the parties stipulated to the release of records to petitioner's counsel. In April 2013, trial was again continued to July 9 because the defense expert had not yet met with petitioner or examined the records handed over by the prosecution. The prosecution had no objection but did announce it was ready for trial. At the trial readiness conference held on June 28, 2013, Whisenand requested trial be continued to November 5, 2013, because of the defense expert's scheduling conflicts and because petitioner was being forcibly medicated.[9] The prosecution did not object, but noted it was ready to proceed to trial.

---

[9] At the evidentiary hearing on the current petition, petitioner testified he was forcibly medicated in the summer of 2013 for 11 days and he continued to take the

On November 1, 2013, petitioner was present. Whisenand requested the trial be continued to January 14, 2014, because the defense expert was not available until then. The prosecution opposed the continuance and stated it was ready for trial and had been ready for some time. When the court inquired of petitioner, petitioner said he wanted the trial continued. The court granted the continuance stating, "[g]iven the absence and unavailability of the defense expert who is obviously a critical component to the presentation at trial" good cause existed for a continuance over the prosecution's objection. At the trial readiness conference on January 10, 2014, Whisenand requested trial be continued to April 23 because petitioner suffered a "very serious medical issue" and personally asked for a continuance by letter and over the phone.[10] Further, Whisenand had not yet received the most recent evaluation from the defense expert. The prosecution announced it was ready for trial but did not object to Whisenand's request given the reasons for it.

On April 18, 2014, Whisenand asked the court to continue trial to November 4, 2014, at petitioner's written request. Whisenand explained, "I know he is considering some programming changes at the hospital, and I've had a hard time communicating lately. So that's why we are asking for such a protracted continuance."[11] The prosecution did not object given that the request came directly from petitioner, but noted it was ready to proceed to trial. On June 6, 2014, petitioner's case was reassigned to Michael Aye because petitioner filed a malpractice complaint against Whisenand creating a conflict between the two.

---

medication on a voluntary basis afterward. Once voluntarily taking the medication, petitioner was in a position to speak with an evaluator or Whisenand.

[10] Petitioner testified he did not have a serious medical issue in January 2014, nor did he ask Whisenand to request a continuance on that basis.

[11] Petitioner testified he did not ask Whisenand to request a continuance in April 2014 because of programming changes.

In his complaint, petitioner alleged that Whisenand failed to perform his legal obligation and duties under the Sixth Amendment to the United States Constitution. When Whisenand was appointed in July 2007, he told petitioner it could take up to a year to prepare for trial. It had now been over six years and Whisenand was not ready for trial. Whisenand told petitioner he had read the case file, but had not yet read pertinent court transcripts, conducted an investigation, obtained defense witnesses, or prepared a trial strategy.

The complaint further alleged that by October 2009, petitioner had written and called Whisenand multiple times without response. Petitioner did not believe *Marsden* motions were recognized in civil proceedings such as his, thus he and his family had requested Whisenand move for substitution of counsel, which Whisenand refused to do. Petitioner and his family figured they would have to hire a new attorney and estimated it would take two years to save the funds to do so. Whisenand was aware of this, but petitioner still gave him direction to prepare for trial in the event petitioner could not secure new counsel.

The complaint also alleged Whisenand failed to respond to letters from petitioner concerning his pending litigation against Saria and Saria's mishandling of evidence. After numerous calls from petitioner and his family, Whisenand spoke with petitioner and said he would look into the issues. Whisenand did not see petitioner in person until 2010, when petitioner briefed Whisenand on his case. At that point, the only things petitioner had received from Whisenand were minute orders of the hearings. Whisenand promised and failed to prepare for trial or supply petitioner with progress reports. In September 2013, Whisenand agreed to expedite petitioner's case but did not follow through with this promise.

At the evidentiary hearing on petitioner's current petition, Whisenand testified he took over petitioner's case after the probable cause hearing. While Whisenand represented petitioner, nothing was pending in court regarding petitioner's case.

Whisenand most likely talked to petitioner about the time it would take him to prepare for trial. He recalled that there was a lot of material to review, most of which was collateral or inadmissible but Whisenand wanted to become familiar with it. This material had to do with letters from the mother of petitioner's victims, indicating she had coached the children's testimony. While the two discussed trial as the only way to resolve petitioner's case, they never set a timeline for going to trial.

Petitioner told Whisenand he did not want to go to trial. One reason provided was that petitioner was involved in a class action lawsuit against the Department that he believed would help him and wanted to wait for that matter to be litigated and decided. He was also relying on his family to come up with money to hire a prominent attorney from Southern California to represent him. Whisenand was told that retaining that attorney was a goal, but to Whisenand's knowledge there was never a retention agreement.

Whisenand did not believe he ever hired a defense expert, nor did he believe petitioner asked him to hire an expert. If petitioner asked for an expert, then Whisenand would have hired one. Whisenand was not aware of petitioner filing any motions with the court, nor did he demand his speedy trial right. If petitioner had said he wanted to go to trial, Whisenand would have taken the case to trial. Trial involves getting an expert or at least updating whatever evaluation Saria may have had done. Whisenand acknowledged that he may have had to continue trial at times because of his heavy caseload but did not recall any specific instances of doing so. To Whisenand's knowledge, petitioner's case did not go to trial because petitioner did not want to go to trial. Each continuance was requested after a discussion between Whisenand and petitioner -- the continuances were not for the purpose of delay. In his experience, continuances are given without question in sexually violent predator cases.

Following the *Litmon*[12] decision, Whisenand's practice was to give reasons for delaying trial if the trial had not been set within a year of the probable cause hearing and to get time waivers from his clients. As far as petitioner not being present at any hearings, petitioner never indicated that he wanted to be transported for court appearances. Indeed, he had been the victim of a crime in Sacramento County Jail and did not want to be housed there for that reason.

Petitioner testified he authorized Whisenand to take up to a year to prepare his case for trial. Petitioner never told Whisenand that he did not want to go to trial. Whisenand told petitioner he had read the case file; which petitioner understood to mean that Whisenand had read the sexually violent predator petition and nothing else. Whisenand said he needed to review the transcripts from petitioner's trials and other court records to figure out whether it would support a defense under the Act, but could not because he was busy with other cases. Petitioner was never evaluated by a defense expert, and he did not believe Whisenand had assembled defense witnesses.

Petitioner believed any motion that was filed on his behalf had to first go through his attorney, which is why he never filed a *Marsden* motion against Whisenand. He did, however, write to the court and the prosecution multiple times regarding his case. Although petitioner acknowledged he had filed *Marsden* motions against a subsequent attorney and one against Saria, he did not understand the law and thought he did not have a right to file *Marsden* motions because he was involved in a civil commitment trial and not a criminal trial. He also did not feel comfortable filing *Marsden* motions because he was trying to get along with Whisenand. Petitioner thought he could get a different attorney only if he had the money to do so. Eventually, however, petitioner felt like he had to sue Whisenand for malpractice. He did not ask for a speedy trial in that suit

---

12 *People v. Litmon* (2008) 162 Cal.App.4th 383.

because he did not think it would have been fair considering the time that had already elapsed.

Petitioner's sister testified that she attempted to contact Whisenand on petitioner's behalf 50 to 100 times and was able to speak with him occasionally. When she did talk with him, Whisenand appeared to be a very busy man. He told her once that he had a heavy caseload and another time he told her he was finishing up a case. Whisenand never gave petitioner's sister much information regarding the case.

III

Subsequent Representation[13]

From June 4, 2014, until August 11, 2017, petitioner was represented by Michael Aye. At the first hearing, Aye requested the trial date remain but stated he needed a new expert evaluation because the previous expert on the case had passed away. At the next four hearings, which took place over the course of a year in petitioner's absence, Aye requested trial be continued because petitioner was pursuing "other legal strategies." Continuances were purportedly requested at petitioner's request over the course of the following two years, at times for the same reason -- that petitioner wanted to pursue other legal options.

Near the start of Aye's representation, in September 2014, petitioner signed a *Litmon* waiver of his right to a speedy trial. In the waiver, petitioner provided that "[t]he reason for this waiver, is based upon years of ineffective assistance of counsel, professional negligence, damages and other related matters I sustained in consequence of the last two defense attorneys of record, prior to the court appointment of Michael Aye." Further, petitioner had been fully informed of his right to a speedy trial and was

---

13 In the superior court, petitioner did not contend his speedy trial right was violated during the time after Saria and Whisenand represented him. We relate these facts only to give context to petitioner's claims.

foregoing that in favor of pursuing "certain legal strategies that I have discussed with my attorney." Petitioner also knew he could withdraw the waiver at any time.

At the evidentiary hearing, petitioner testified he signed the *Litmon* waiver because he believed the only way to get the petition under the Act dismissed was to attack the underlying charges given the amount of delay and the resulting prejudice, including the fact that exculpatory evidence he gave to Saria had been lost. While he did not ask Aye to go to trial immediately, he did express his sadness and anger about the years of delay. He told Aye he "felt that because of all the damage that was done to [him] by Saria and Whisenand over those years, that [he] had been prejudiced beyond repair and [his] only alternative at that point would be to pursue [his] litigation against them . . . ."

On August 11, 2017, Rosenfeld began representing petitioner due to Aye's inability to take the matter to trial within a reasonable time.[14] Rosenfeld requested a continuance to obtain updated evaluations of petitioner for the defense and to review the thousands of pages of material necessary for him to be ready to take the case to trial. Petitioner objected to Rosenfeld's representation and sent a letter to the court saying as much. The objection was based on a conflict of interest because Rosenfeld had been named in petitioner's malpractice lawsuit against Saria since the two were law partners. In January 2018, petitioner filed a motion for substitution of counsel. He also brought a *Marsden* motion to relieve Rosenfeld as counsel. Both motions were denied.

On June 6, 2018, a jury found petitioner to be a sexually violent predator after trial in which he was represented by Rosenfeld.

---

[14] By this time, petitioner had filed the present writ petition and the prosecution demanded trial.

IV

The Superior Court's Decision

The court issued a 91-page opinion on September 4, 2018, granting petitioner's writ of habeas corpus and further vacating the sexually violent predator finding and petitioner's subsequent commitment to the Department. While the superior court recited the facts in detail, it did not make many factual findings. For instance, it made no credibility finding as it relates to petitioner's evidentiary hearing testimony or that of Saria or Whisenand. It did, however, find that no progress had been made preparing petitioner's case for trial. Thus the court credited Whisenand's and Saria's evidentiary hearing testimony and found Whisenand's stated reasons for continuing trial disingenuous at the time they were given. It, however, did find that Whisenand needed continuances based on his heavy caseload. Further, the parties stipulated petitioner never underwent sex offender treatment. It found petitioner's attorneys acceded to petitioner's wishes without following through with investigation or preparations for trial, thus misleading petitioner as to the cause of the delay. Finally, the superior court was troubled by counsels' waiver of petitioner's presence and speedy trial right in the absence of the court's confirmation of these waivers.

As to the superior court's legal conclusions, "[t]he court f[ound] that all parties involved contributed to deprivations of petitioner's rights. Judges allowed continuances without requiring petitioner's counsel to show good cause for the continuance. [The prosecution] failed to object to the continuances or ask that petitioner's counsel make a good cause showing for continuances. Petitioner's counsel failed to set forth on the record any justification for the continuances and failed to demonstrate that any progress had been made toward preparing the case for trial. Petitioner's counsel appeared to simply accede to some of petitioner's wishes, without doing anything demonstrable to investigate and prepare the matter for trial.

"The prejudice to petitioner has been severe, as he spent 14 years waiting for a trial, without the opportunity to be reevaluated on an annual basis and to petition the court for release. Although petitioner has chosen not to participate in the programming at Coalinga throughout the years, it [is] not clear to the court that either petitioner or any of his past counsel understood that by not going to trial, he forfeited any chance of being released. Perhaps if petitioner had gone to trial and been found to be [a sexually violent predator], he would have understood the importance of attending the programming, in order to have opportunity for release."

"The failure of the court, the prosecutor, and petitioner's initial defense counsels to report, inquire, and check on defense counsels' diligent efforts to proceed to trial, resulting in petitioner's languishing in a state hospital, without any commitment, and without any opportunity to petition for release, is shocking. It should not have taken 14 years for a reasonable defense counsel to review the [prosecution's] evaluations, to obtain experts to conduct a defense evaluation, and to determine whether testimony from any witness would be admissible and beneficial. To not undertake investigation at all, because an attorney is waiting for petitioner to say 'let's go to trial,' is not acceptable."

The People appeal.

DISCUSSION

The People contend the superior court erred by granting the petition because it rejected petitioner's desire to not proceed to trial in favor of finding that defense counsel, the trial court, and the prosecution should have acted in petitioner's best interest by advancing his case. We disagree. The superior court found overwhelming evidence petitioner's attorneys were never prepared to go to trial, explaining petitioner's lack of desire to assert his right. Petitioner's assertion of his right to a speedy trial is but one factor in weighing a speedy trial violation, and that factor did not weigh heavily against petitioner. The superior court found the other factors in combination weighed against the

state, and we conclude there was no error in its ultimate finding that a speedy trial violation occurred.

"The [Act] does not specify a time by which a trial on a commitment proceeding . . . must be commenced or concluded." (*People v. Sanders* (2012) 203 Cal.App.4th 839, 846.) However, "[t]he Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." (*Wilkinson v. Austin* (2005) 545 U.S. 209, 221 [162 L.Ed.2d 174, 189]; see U.S. Const., 14th Amend., § 1 ["nor shall any State deprive any person of life, liberty, or property, without due process of law"].) "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425 [60 L.Ed.2d 323, 330-331]; see also *Vitek v. Jones* (1980) 445 U.S. 480, 493-494 [63 L.Ed.2d 552, 565] [convicted felon is entitled to due process protection before being found to have a mental disease and transferred to a mental hospital].) Our California Supreme Court has recognized that a commitment under the Act, "unquestionably involves a deprivation of liberty, and a lasting stigma." (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1194.)

Litmon provided that cases such as petitioner's were to be analyzed under the standards articulated in the Supreme Court cases of *Barker v. Wingo* (1972) 407 U.S. 514 [33 L.Ed.2d 101] (*Barker*) and *Mathews v. Eldridge* (1976) 424 U.S. 319 [47 L.Ed.2d 18] (*Mathews*). (*Litmon*, *supra*, 162 Cal.App.4th at pp. 396, 398-399.) The superior court applied those tests here when granting petitioner's writ petition.

" 'In an appeal from an order granting a petition for habeas corpus after an evidentiary hearing, basic principles of appellate review apply, and thus, questions of fact and questions of law are reviewed under different standards. [Citation.] . . . [F]indings of fact will be accorded due deference under the substantial evidence standard. [Citation.] However, "[t]his court . . . independently reviews questions of law, such as

the selection of the controlling rule." [Citation.] Mixed questions of law and fact are reviewed under the clearly erroneous standard if the inquiry is predominantly factual, but are reviewed de novo if the application of law to fact is predominantly legal.' " (*In re Andres* (2016) 244 Cal.App.4th 1383, 1393.)

I

The Barker Test

The *Barker* test sets out four factors to be considered when determining whether a delay has resulted in a denial of due process: " '[the] length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant' " (*Litmon, supra,* 162 Cal.App.4th at p. 398), with an extensive pretrial delay being presumed prejudicial (*id*. at p. 405; see *Barker*, *supra,* 407 U.S. at p. 530 [33 L.Ed.2d at p. 117]; *Doggett v. United States* (1992) 505 U.S. 647, 657 [120 L.Ed.2d 520, 532]).

A

Length Of Delay

" 'The first *Barker* factor, the length of the delay, encompasses a "double enquiry." [Citation.] "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay [citation], since, by definition, he cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. [Citation.] This latter enquiry is significant to the speedy trial analysis because . . . the presumption that pretrial delay has prejudiced the accused intensifies over time." ' " (*People v. Superior Court (Vasquez)* (2018) 27 Cal.App.5th 36, 60-61, quoting *People v. Williams* (2013) 58 Cal.4th 197, 234 (*Williams*).)

The People concede the length of the delay here was extraordinary and triggered a speedy trial analysis under *Barker*, thus weighing against the state. (See *Barker*, *supra*, 407 U.S. at p. 533 [33 L.Ed.2d at p. 119] [delay of over five years was extraordinary]; *Williams*, *supra*, 58 Cal.4th at p. 235 [delay of seven years was extraordinary]; *People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at 61 [delay of 17 years was extraordinary]; *Litmon*, *supra*, 162 Cal.App.4th at p. 405 [one-year delay "create[d] a presumption of prejudice that triggers a *Barker* type of balancing test"].) The People, however, note that the delay was merely 10 years and not 14 as the court found. We agree the delay was 10 years, as petitioner challenged only the delay between 2004 and 2014 when he was represented by Saria and Whisenand.

Petitioner argues the delay was 14 years based on Aye's and Rosenfeld's obvious conflicts of interest and resulting violations of petitioner's due process rights. Petitioner, however, conceded in the superior court that he was not challenging the time during which he was represented by Aye and Rosenfeld as having violated his speedy trial rights. Petitioner's appellate arguments to the contrary are factually undeveloped contentions. Thus, we will not consider them. (*People v. Baker* (2018) 20 Cal.App.5th 711, 720 [fact specific inquiries not raised in the trial court are forfeited on appeal].) The length of the delay was 10 years.

B

Reason For Delay

" 'A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.' " (*People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at p. 64, quoting *Barker*, *supra*, 407 U.S. at p. 531 [33 L.Ed.2d at p. 117], fn. omitted; accord, *Williams*, *supra*, 58 Cal.4th at p. 239.)

As the court did in *Vasquez* and our Supreme Court did in *Williams*, we will consider the conduct of the prosecution, the defense, and the trial court. Starting with the prosecution, the court found it was at fault for failing to object to the multiple continuances requested by the defense and failing to insist on good cause showings for those requested continuances. The People contend there was no affirmative showing the prosecution engaged in a deliberate attempt to delay the trial nor was it a chronic systematic delay only the government could rectify. While we agree, as did the superior court, that the prosecution did not deliberately delay petitioner's trial to gain a strategic advantage, we do not agree that a chronic systemic delay did not occur. The prosecution regularly stipulated or agreed to continuances without objection. While it first announced it was ready to proceed to trial in April 2013, this was nine years into the 10-year delay. It was not until November 2013 that the prosecution opposed the defense's continuances seemingly because petitioner was present at that hearing. At the remaining hearings during Whisenand's representation, the prosecution reverted to announcing ready for trial but not opposing the requested continuances. This, in conjunction with the prosecution's stipulations to continuances throughout the entire pendency of petitioner's trial, supports the superior court's conclusion that, while not deliberate, the prosecution contributed to the delay.

As for the defense, the court found it was most at fault due to petitioner's attorneys' failure to bring his case to trial. It found that no justifications were made for the continuances at the time they were requested; and to the extent justifications were made, they were contradicted by counsels' later testimony indicating that no progress was made between 2004 and 2014. Relying on *Vermont v. Brillon* (2009) 556 U.S. 81 [173 L.Ed.2d 231] (*Brillon*), the People assign error to this conclusion.

In *Brillon*, the Supreme Court stated that "[b]ecause 'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by the defendant's counsel is also charged against the defendant. . . . Unlike a

prosecutor or the court, assigned counsel ordinarily is not considered a state actor." (*Brillon, supra,* 556 U.S. at pp. 90-91 [173 L.Ed.2d at p. 240].) There, the defendant was represented by six different attorneys over a three-year period before he was brought to trial. (*Id*. at pp. 85-88 [173 L.Ed.2d at pp. 237-238].) The Vermont Supreme Court concluded that two years of the delay should be attributed to the state because the delays were " 'caused, for the most part, by the failure of several of defendant's assigned counsel, over an inordinate period of time, to move his case forward.' " (*Id*. at pp. 88-89 [173 L.Ed.2d at p. 239].) The United States Supreme Court reversed, concluding it was error "attributing to the State delays caused by" assigned counsel's failure to move the case forward and failing to consider the defendant's "disruptive behavior in the overall balance." (*Id*. at pp. 91, 92 [173 L.Ed.2d at p. 241].)

The Supreme Court explained, "An assigned counsel's failure 'to move the case forward' does not warrant attribution of delay to the State. . . . While the Vermont Defender General's office is indeed 'part of the criminal justice system,' [citation], the individual counsel here acted only on behalf of [the defendant], not the State." (*Brillon, supra,* 556 U.S. at p. 92 [173 L.Ed.2d at p. 241].) The court explained, "A contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds." (*Id*. at p. 93 [173 L.Ed.2d at p. 241].)

As to the defendant's own conduct, he "sought to dismiss his first attorney on the eve of trial, resulting in the trial court granting the attorney's motion to withdraw as counsel. [Citation.] After the second attorney withdrew almost immediately because of a conflict, a third attorney represented [the defendant] for three months. [Citation.] The defendant sought to dismiss this attorney for failing to file motions and a lack of communication and diligence, but the attorney responded that 'he had plenty of time to prepare' and simply disagreed with [the defendant] on trial strategy. [Citation.] That attorney later withdrew as counsel after [the defendant] threatened his life during a

courtroom break," resulting in the trial court warning the defendant of the delay his threat caused. (*People v. Superior Court (Vasquez)*, *supra*¸ 27 Cal.App.5th at pp. 65-66.)

According to the Supreme Court, by these actions it was the defendant who delayed the trial, likely making it difficult for the public defender's office to find a replacement counsel. (*Brillon*, *supra*, 556 U.S. at p. 93 [173 L.Ed.2d at p. 242].) "Even after the trial court warned [the defendant] that his actions were causing delay, the defendant sought to dismiss his fourth attorney, whom the trial court dismissed after he reported his contract with the public defender's office had expired, without making findings as to the adequacy of the attorney's representation. [Citation.] It was not until eight months later that his sixth and final attorney was appointed." (*People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at p. 66.) Thus, the Supreme Court weighed the defendant's conduct heavily against him. (*Brillon*, *supra*, 556 U.S. at pp. 93-94 [173 L.Ed.2d at p. 242].)

Notably, however, the Supreme Court carved out an exception, stating, "The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic 'breakdown in the public defender system,' [citation], could be charged to the State. [Citation.] But the Vermont Supreme Court made no determination, and nothing in the record suggests, that institutional problems caused any part of the delay in [the defendant's] case." (*Brillon*, *supra*, 556 U.S. at p. 94 [173 L.Ed.2d at p. 242].)

Petitioner's case is somewhat different than *Brillon* in that petitioner was not disruptive nor is there evidence he contributed to the delay of his trial by failing to get along with his attorneys or failing to assist in his defense. By all indications, petitioner took an active role in his defense and attempted to be as helpful as he could to both Saria and Whisenand. His efforts were met with platitudes and false promises. In fact, the investigation petitioner was encouraged to engage in by Saria over the course of the two years before his probable cause hearing was not utilized or referenced at the eventual

hearing and Saria acknowledged at the evidentiary hearing that he had no intention of presenting such a defense. Further, Whisenand's stated reasons for continuances proved to be false.

Petitioner's case is like *Brillon* in the sense that petitioner's attorneys failed to move his case forward. Our Supreme Court's case in *Williams* requires we hold petitioner responsible for that delay, at least in part. There, our Supreme Court concluded that the record indicated "that most of the delay in this case, apart from the periods already attributed to defendant, resulted from defense counsel's failure to make progress in preparing defendant's case. Consistent with defendant's frequent complaints, defense counsel repeatedly acknowledged -- at the beginning, in the middle, and even toward the end of the pretrial period -- that little or no work had been done on defendant's case. The problem was exacerbated by what the prosecution called 'the revolving door of defense attorneys.' Defendant was represented by a total of eight attorneys over the seven-year period -- two from the public defender's office . . . and six from the criminal defense panel . . . each of whom needed time to review the case and many of whom apparently spent months doing little or no work on the case, only to withdraw later because of a conflict." (*Williams, supra*, 58 Cal.4th at p. 244.)

The *Williams* court distinguished *Brillon*, noting the first three years of delay were " 'caused mostly by Brillon.' " (*Williams, supra*, 58 Cal.4th at p. 248.) By contrast, in *Williams*, the "defendant endured a much longer delay, approximately four years of which resulted from the chronic lack of progress and repeated coming and going of defense counsel notwithstanding defendant's recurring complaints that nothing was being done to bring him to trial." (*Ibid.*) Our Supreme Court observed, however, that the record did not support a finding of a systemic breakdown in the public defender system, as opposed to the lack of progress by individual appointed attorneys. (*Ibid.*) The court explained, "It is possible that the 'revolving door' of appointed counsel in this case is indicative of 'institutional problems' [citation] in Riverside County's Indigent Defense

Program. But the record on appeal contains no facts that affirmatively support this conclusion. Because defendant did not file a motion to dismiss on speedy trial grounds in the trial court, the underlying cause of the delay in this case was never litigated, the various statements by defendant and his attorneys were never examined in an adversarial proceeding, and the trial court made no findings that might inform the issue before us." (*Ibid*.)

Here, the court did not make a finding there were institutional problems with the public defender system nor did it undertake that inquiry. Like the superior court, however, we do not believe counsel's failure to progress the case should be weighed heavily against petitioner because at its core the fault was with the trial court. The record reflects, and the superior court found, attorneys in sexually violent predator matters were never held to any standard when requesting continuances. This allowed any counsel, whether it be the prosecution or the defense, to be granted continuances pro forma and without any recitation on the record concerning the progress of the case. Indeed, the record is devoid of any indication Saria or Whisenand made progress or received an informed time waiver from petitioner.

The timeline of petitioner's case shows that petitioner asked Saria to request continuances from the date of his representation until the probable cause hearing for the purpose of preparing a defense. A defense, Saria testified at the evidentiary hearing, that was not viable given the state of the law. Thus, while petitioner requested these continuances, we cannot hold those requests heavily against him since he was led to believe the continuances were necessary. Taking advantage of petitioner's misunderstanding, Saria requested continuances without reasons stated on the record, which were pro forma accepted by both the prosecution and the court.

Petitioner undoubtedly wanted Saria prepared for the probable cause hearing. This fact is repeated over and over in his letters to Saria. Saria, however, testified that it was nearly impossible to be unprepared for the probable cause hearing as long as an attorney

read the expert reports submitted by the prosecution. Thus, the delay of two years was not necessary; however, we cannot distinguish from this record how much of the delay was necessary for the prosecution to prepare because no explanation was ever required of counsel on the record and some of the record has been destroyed given the length of time that has elapsed. Thus, like the superior court, we believe the delay in this case was not just Saria's failure to bring petitioner's case to trial. We believe the fault also lies with the trial court.

From the time the prosecution sought commitment of petitioner as a sexually violent predator through the time when his probable cause hearing was held, the law required he be adjudged a sexually violent predator every two years. (Former § 6604; Stat 2000, ch. 420, §3, pp.3139-3140.) Petitioner was not brought to a probable cause hearing until his initial commitment would have nearly expired if it had occurred promptly -- as Saria represented it could have. No state actor seemed alarmed by the fact petitioner was in Coalinga effectively serving a sentence for which he was never committed. Instead, continuances were requested and granted without any appreciable time or thought given to the matter. This indicates an institutional breakdown in the system, where the record demonstrates an understanding between the state actors involved that defendants like petitioner can be ignored and their cases prolonged without justification, especially when they are not present before the trial court to assert their rights or particular wishes regarding their cases.

The Second District, Division Seven put it aptly in *Vasquez*: "We conclude the trial court must share responsibility for some of the delay. As [our] Supreme Court has stated, ' " ' "the primary burden" to assure that cases are brought to trial is "on the courts and the prosecutors." ' [Citation.] Furthermore, 'society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.' [Citation.] Thus, the trial court has an affirmative constitutional obligation to bring the defendant to trial in a timely manner." ' (*Williams*, *supra*, 58 Cal.4th at p.

251; accord, [*People v.*] *Landau* [(2013)] 214 Cal.App.4th [1,] 41 [‘the court and the district attorney bear ultimate responsibility for providing a timely trial to a person against whom [a sexually violent predator] petition has been filed’]; *Litmon*, *supra*, 162 Cal.App.4th at p. 406 [‘ “the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial” ’].) To the extent the trial court is responsible for a portion of the delay, it is attributable to the state. [Citations.]

“We recognize the trial court did not initiate any of the continuances, instead granting continuances at the request of [the defendant’s] counsel or by stipulation of counsel. The record shows that many of these continuances were granted for good cause, including, for example, while the attorneys were waiting for new expert evaluations or after the trial court ruled that a new probable cause hearing was required. However, during the first 14 years of [the defendant’s] confinement, his case was continued over 50 times, either by stipulation of counsel or a request by [the defendant’s] counsel. The record does not reflect whether the trial court made a finding of good cause for these continuances. As [our] Supreme Court observed in *Williams*, ‘ “[I]t is entirely appropriate for the court to set deadlines and to hold the parties strictly to those deadlines unless a continuance is justified by a concrete showing of good cause of the delay.” ’ [Citation.] It does not appear from the record that during the first 14-year period the trial court took meaningful action to set deadlines or otherwise control the proceedings and protect [the defendant’s] right to a timely trial. While it may be that [the defendant] was not seeking a speedy trial because he was facing evaluations supporting his commitment, we cannot tell because [the defendant] was not present in court during most of this period. Neither is there a record of any inquiry by the trial court as to why the case was dragging on for so many years. Even where the attorneys stipulate to continue a trial date, the trial court has an obligation to determine whether there is a good cause for the continuance. The trial court also has a responsibility absent a written time waiver to inquire of a defendant whether he or she agrees to the delay. Had the trial court inquired

of [the defendant] during this first 14-year period, we would know whether [the defendant] was seeking a speedy trial, or was content to let his case be continued so long as the evaluations supported his commitment." (*People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at pp. 74-75, fn. omitted.)

This reasoning also holds true for the time during which Whisenand represented petitioner. While petitioner can be said to have contributed to the delay, at least in part, because it was a result of his attorney's failure to progress the case and petitioner's seeking of private counsel from January 2007 to June 2007, the trial court bears much of the responsibility.

It was not until June 2010, nearly three years into Whisenand's representation that he began providing reasons specific to petitioner's case for his requested continuances. Before that, Whisenand either did not provide reasons, was not present, or stated he was busy with other trials. As the superior court found, however, these reasons appear to have been false as Whisenand did not secure a defense expert or make progress on the case. Then in March 2011, no reasons were given, followed by Whisenand being in trial from August 2011 to April 2012, in addition to reasons later discounted by the superior court. Continuances were granted until February 2013 without reasons appearing in the record. April 2013 saw a continuance because the defense expert Whisenand purported to obtain in June 2010 had still not seen petitioner. At this point, the prosecutor announced it was ready but did not object to any continuance requested through April 2014, except at the November 2013 hearing when petitioner was present. At that hearing, Whisenand stated the defense expert was not available for a trial until January 2014 -- a reason the superior court found false given Whisenand's evidentiary hearing testimony that no expert was ever retained for the case.

If the trial court had set deadlines or the prosecution objected to further continuances, the disingenuous reasons provided by Whisenand would have become clear. Nearly three years into his representation, Whisenand stated he was in the process

of securing a defense expert, yet that expert had not met with petitioner as of April 2013 -- five and one-half years into the representation. Nor did Whisenand receive a report from the expert as of January 2014 -- over six years into the representation and three years following the expert's purported retention. If the trial court had secured the presence of petitioner at any point it may have become clear that he had never seen an expert retained by Whisenand. His true wishes regarding the pace of his trial may also have become clear and the court may have even secured a time waiver from him. As the record stands, however, the only assurance petitioner waived his speedy trial right during Whisenand's representation is Whisenand's word and petitioner's single appearance where he was assured trial would occur in two months when an expert was available. No written waiver was ever produced despite Whisenand's evidentiary hearing testimony that it was his practice to obtain such waivers.

Given the disingenuous reasons for the requested continuances and the court's and prosecution's failure to move the case along or verify petitioner's wishes, we conclude the superior court did not err by finding the reasons for the delay rested primarily with the state, despite the fact that petitioner also shared in that responsibility.

C

Petitioner's Assertion Of His Right

"*Barker* rejected 'the rule that a defendant who fails to demand a speedy trial forever waives his right.' [Citation.] But the high court cautioned that its rejection of the demand-or waiver-rule did not mean that a defendant has no responsibility to assert his right. [Citation.] Rather, 'the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.' " (*Williams, supra,* 58 Cal.4th at p. 237.)

The People spend little time on this factor, asserting only that petitioner did not assert his right until June 29, 2017, when he filed his writ petition. We think it more nuanced than that. True, the superior court did not analyze this factor beyond reciting it

in its factual recitation; however, it impliedly did not hold petitioner's failure to assert his right against him given the circumstances of petitioner's hearings and detainment.

"As the Supreme Court stated in *Williams*, ' "The issue is not simply the number of times the accused acquiesced or objected; rather, the focus is on the surrounding circumstances, such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct (as that conduct bears on the speedy trial right), and so forth. [Citation.] The totality of the accused's responses to the delay is indicative of whether he or she actually wanted a speedy trial." ' " (*People v. Superior Court (Vasquez), supra*, 27 Cal.App.5th at p. 62.),

"In *Williams* the People argued that because the defendant had consented to 17 out of 19 continuances, he had not asserted his right to a speedy trial. [Citation.] The defendant responded, as here, that he only waived time because he had no alternative given his attorney's lack of preparation. [Citation.] The court did not reach whether the defendant's acquiescence in the continuances showed his lack of 'a sincere desire to have a speedy trial' in light of its conclusion that the delays in the trial were principally attributable to the defendant. [Citation.] In *Litmon*, the court observed that 'a belated assertion of a procedural due process right to a speedy [sexually violent predator] trial is entitled to less weight than a prompt assertion of such right,' but gave 'serious weight' to [that defendant's] assertion of his right in his later motion to dismiss." (*People v. Superior Court (Vasquez), supra*, 27 Cal.App.5th. at p. 63, fn. 18.)

The record fails to show that petitioner did not want to go to trial. It shows he " 'was forced to choose between proceeding to trial with an unprepared attorney, or giving up his right to a speedy trial -- truly a Hobson's choice. Under these circumstances, it is unfair to give significant weight to [petitioner's] failure to assert his right to a speedy trial.' " (*People v. Superior Court (Vasquez), supra*, 27 Cal.App.5th at pp. 62-63.) Petitioner was rarely if ever present to assert his right to a speedy trial.

When he was present while being represented by Saria, he brought a *Marsden* motion to complain of the delay and Saria's unpreparedness. Indeed, petitioner's letters to Saria were filled with complaints about the failure of his case to progress.

As to Whisenand, the record is sparse regarding petitioner's contemporaneous thoughts about his speedy trial right. Petitioner testified he permitted Whisenand to take up to a year to prepare for trial. He was rarely, if ever, present to assert his speedy trial right, but claimed in his malpractice suit that he asked Whisenand to move to relieve himself from representing petitioner, just to have those requests ignored. In line with this, petitioner asserted in his complaint and during testimony that he believed he could not bring a *Marsden* motion because of the civil nature of his trial. The whole of petitioner's malpractice complaint takes issue with Whisenand's lack of progress and petitioner's inability to relieve his counsel. When petitioner was finally present in November 2013 he agreed to a continuance until January 2014, when the defense expert would be available. But, as discussed, this appeared to be misleading as Whisenand testified at the evidentiary hearing that no defense expert had ever been retained. Given petitioner's lack of written waiver, lack of presence at his hearings, and the superior court's finding that Whisenand did not move petitioner's case forward, we conclude it " 'unfair to give significant weight to [petitioner's] failure to assert his right to a speedy trial.' " (*People v. Superior Court (Vasquez), supra,* 27 Cal.App.5th at p. 63.)

The same, however, cannot be said of petitioner's waiver between September 2014 and his eventual trial. At that time, petitioner signed a *Litmon* waiver asserting he was waiving time and pursuing other legal strategies due to the ineffective assistance of counsel he had received from Saria and Whisenand. To not hold this delay against petitioner would be unfair to the state and strikes at the heart of the Supreme Court's concerns in *Brillon*, which feared defendants and their appointed counsel would seek unreasonable continuances in the hopes of obtaining dismissal on speedy-trial grounds. (*Brillon, supra,* 556 U.S. at pp. 92-93 [173 L.Ed.2d at p. 241].)

Conversely, the delay during Saria's and Whisenand's representation does not implicate these concerns. In the context of sexually violent predator litigation, it benefits defendants to proceed to trial promptly. In petitioner's case, if he had gone to trial within a reasonable time, the prosecution would have had to seek recommitment every two years and once the law changed, petitioner would have been eligible to petition the court for release every year. (Former § 6604; Stat. 2000, ch. 420, § 3, pp. 3139-3140; §§ 6604.9, 6608, subd. (a).) By delaying trial for 10 years, the prosecution achieved what it wanted to achieve (petitioner's commitment) without ever having to prove petitioner met the criteria of a sexually violent predator. Thus, while petitioner failed to assert his right to a speedy trial, the superior court did not err by failing to hold the first 10 years against him.

D

Prejudice

" 'Whether [a] defendant suffered prejudice as a result of the delay must be assessed in light of the interests the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." ' [Citations.] As the court in *Litmon* observed, however, '[L]engthy postdeprivation pretrial delay in [a] [sexually violent predator] proceeding is oppressive. In this case, we cannot turn a blind eye to the years of pretrial confinement that have elapsed following expiration of the last ordered term of commitment.' [Citations.] . . . [¶] To demonstrate prejudice, [petitioner] need not show 'a loss of witnesses, loss of evidence, or fading memories,' as the People contend. Rather, it is the loss of time spent in pretrial custody that constitutes prejudice." (*People v. Superior Court (Vasquez), supra*, 27 Cal.App.5th at p. 63.)

The right to a jury trial is not a mere formality. "It may well be there was strong evidence in the People's favor, but it was the government's burden to prove [the defendant] was [a sexually violent predator] and [the defendant] had a right to present evidence showing he did not pose a risk to the public." (*People v. Superior Court*

(Vasquez), supra, 27 Cal.App.5th at pp. 63-64.) "As the court in *Litmon* observed, a defendant's 'extended confinement without any determination that he [is] [a sexually violent predator]' results in an irretrievable loss of liberty, 'regardless of the outcome of trial.' " (*Id.* at p. 64, quoting *Litmon*, *supra*, 162 Cal.App.4th at p. 400.)

Acknowledging *Vasquez* and *Litmon*, the People argue *Barker* did not envision the type of prejudice discussed in those cases. Instead, the People argue the conditions of petitioner's confinement were not oppressive because he was in a state hospital and not in prison and because his family life and employment had already been disrupted by his prior prison commitment. We are not persuaded. Petitioner's expectations upon being released from prison was to not be physically confined at all. Instead, he was confined in an institution where he suffered a loss of liberty beyond what he would have encountered while serving parole. Further, he was housed away from his family and unable to seek employment. Just because petitioner lived this way before the state sought to civilly commit him does not mean he was not prejudiced for the 10 years he continued to be incarcerated while awaiting civil commitment. Further, we do not accept the People's argument that delay would improve petitioner's defense because with the delay he aged and could progress in his sexually violent predator treatment -- two factors weighing in his favor. This would also be true if he had been found a sexually violent predator and had been subsequently reviewed each year, when he would have also been able to prevail upon these factors and petition for release. (§§ 6604.9, 6608, subd. (a).) Instead, he could not petition for release because he had not yet been committed as a sexually violent predator.

Here, the People concede the 10 years of pretrial detention was presumptively prejudicial. As in *Vasquez*, this was prejudicial " 'particularly in light of the fact that [petitioner] originally faced a two-year commitment if found qualified under the statute. Those [10] years are gone. As the *Litmon* . . . court observed, time once past can never be recovered.' " (*People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at p. 64.)

We agree. Further, because the reason for the delay rests primarily with the state, the presumption of prejudice weighs heavily in petitioner's favor as the cause of the delay is the pivotal question. (*Williams*, *supra*, 58 Cal.4th at p. 237.)

Accordingly, the superior court did not err by finding the *Barker* factors weighed in petitioner's favor.

II

The Mathews Test

The *Mathews* test balances " ' "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [third], the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." ' " (*Litmon*, *supra,* 162 Cal.App.4th at p. 396.)

The People concede the first *Mathews* factor weighs in favor of petitioner in that his private interest of remaining free from involuntary confinement is significant. It, however, argues the second and third factors weigh against petitioner.

The People argue the second factor weighs against petitioner because there was minimal risk he was erroneously deprived of his liberty because there is no indication petitioner had received a negative evaluation or participated in sex offender treatment. This is in contrast to *Vasquez*, they argue, where the defendant participated in sex offender treatment and received a negative evaluation. (See *People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at pp. 81-82.) In *Vasquez*, however, the court noted "even if [the defendant] had been committed after a trial, he was facing only a two-year commitment, and the people would have needed to file successive petitions to continue his commitment, at least until the law provided for an indeterminate term of commitment, effective in 2007. [Citations.] Instead, [the defendant] was detained on the original petition for 17 years." (*Id.* at p. 82.) The same is true here.

Further, although there is no indication petitioner received a negative evaluation, the record does not indicate how many evaluations petitioner underwent. He clearly underwent an evaluation before his probable cause hearing, which was updated before that hearing. And again had to have had an evaluation before his 2017 trial. The record does not reflect that he was evaluated throughout the intervening years and consistently found to be a sexually violent predator. There is also no indication regarding what petitioner would have done with a jury finding that he was a sexually violent predator. Perhaps he would have participated in sex offender treatment, as the superior court queried, in the hopes of achieving his release. Instead, he was detained in anticipation of his initial commitment for 14 years, 10 of which can be primarily attributed to the state. Thus, while the record may not affirmatively reflect petitioner had the potential of a favorable finding following trial on the original petition, the delay ensured any favorable finding on subsequent petitions was impossible.

As to the third factor, the People argue it weighs in favor of the state because the state has an important interest in confining a potential sexually violent predator pending trial. We agree the state holds this important interest. But to accept it at face value, that such an interest viewed in isolation meets the third factor, would give the state unbridled authority to confine potential committees into perpetuity. Instead we agree with *Vasquez*. " '[T]he state has no interest in the involuntary civil confinement of persons who have no mental disorder or who are not dangerous to themselves or others[;]' . . . '[t]he burden in going to trial in year two as opposed to going to trial in year [10] involves no additional administrative or fiscal burdens.' This is in contrast to *Mathews*, in which the court held the government had an interest in delaying an evidentiary hearing on denial of a recipient's disability benefits until the final termination of benefits." (*People v. Superior Court (Vasquez)*, *supra*, 27 Cal.App.5th at p. 82.)

Finally, the People argue the *Mathews* test is imperfect when analyzing the speedy trial right in the sexually violent predator context and point us to several flaws in the

superior court's analysis. Even if imperfect, *Mathews* is considered in conjunction with *Barker* and both tests balance in petitioner's favor that there was a due process violation. We emphasize that this is a balancing test, and while the superior court did not acknowledge that the delay was 10 years rather than 14 years and did not state that it attributed counsels' failure to progress the case to petitioner, what it did state was sufficient to uphold its order. The superior court found the court's and prosecution's failure to insist on progress reports and good cause showings for continuances, especially in petitioner's absence without verified waivers of his speedy trial right, left petitioner's constitutional rights unprotected. The effect was that petitioner was left without an advocate. The superior court did not find petitioner's counsel should move the case forward even if he desires a delay, but that the court and prosecution should confirm that petitioner in fact desired a delay. We conclude the superior court did not err by granting petitioner relief.

DISPOSITION

The order granting habeas relief is affirmed.

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Mauro, J.